

The Fundamentals of Counterterrorism Law¹

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Introduction

National Security Law can be a difficult topic to grasp, particularly for a law student or entry-level practitioner. The various subsets, such as Counterterrorism Law (CT law), the Law of Armed Conflict, and Cyber-terrorism Law, are equally difficult topics to master. Two primary reasons contribute to this murkiness. First, National Security Law, unlike other familiar core competency topics such as Criminal or Property law, does not involve an extensive and well-developed case law history, nor do our nation's courts often address the issue. Instead, National Security Law is largely based on statute and executive order on the domestic side and on treaty and customary international law for international issues, sprinkled with the few judgments of international tribunals as well as our own federal courts' recent guidance for detainees from the battlefield. The second reason National Security Law is difficult to grasp relates to the first: because so much of National Security Law relates to a particular country's or foreign tribunal's interpretation of international law, much of the resulting law that has been developed in our country is actually driven by policy. Indeed, for National Security practitioners, there is also a significant third rail that bridges law and policy, sometimes referred to as "legal policy."² Since so much of National Security Law resides in the policy and legal policy domains, textbooks and articles purporting to provide the "fundamentals" of National Security Law often jump right into policy discussions and debates without first clearly laying out the statutory, treaty, or international common law underpinnings of the law. These discussions are important, no doubt, as they constitute the very dialogue that shapes National Security Law, but they also often dominate the discussions in National Security Law classes and references at the expense of addressing the fundamentals.

So when a book comes along titled, *The Fundamentals of Counterterrorism Law*, the first question to answer is how the book fares in actually laying out the fundamentals. Does it give a summary of the legal underpinnings of CT Law? If so, does it also successfully weave in the policy debates and perspectives? Would it serve as a good text or hornbook for a student of CT Law? Similarly, would it serve as a good reference for an attorney interested in learning what Counterterrorism Law practice might look like? Would it

answer the mail in providing a beginner the fundamentals he or she needs?

In short, *The Fundamentals of Counterterrorism Law* does a good job when pressed with the questions above. To be fair, the book is a successor to *The Law of Counterterrorism*, of the same editor and publisher, and some of the gaps in the current edition are indeed filled by its predecessor. Twenty-six national security law academics, practitioners, experts and consultants contribute to eighteen chapters, so this review will not summarize or even evaluate every chapter. However, the book's articles can be grouped into several topical themes, and this review attempts to identify which of these groupings were particularly useful and how others may have missed the mark?

The book begins with an illustrative discussion by Lieutenant Colonels (LTCs) Shane R. Reeves³ and Robert E. Barnsby⁴ about the transitive nature of warfare and the necessity for Law of Armed Conflict (LOAC) to stay apace with this evolution.⁵ The book then provides eighteen chapters covering the gamut of CT Law topics, including LOAC, contractors on the battlefield, separation of powers as it pertains to funding detainee operations, and ethics for national security lawyers. Most of the chapters read fairly well and do not lose the reader with intricate legal terms or lofty academic discussions. Some chapters do better than others at actually delivering the fundamentals of CT law.

The FBI and Law Enforcement Chapters

Robert M. Blitzer⁶ provides a strong start to the substantive portion of the book with a succinct summary of laws affecting and empowering Federal Bureau of Investigations (FBI) operations and the transition of these ground rules after 9/11.⁷ The second of three chapters focusing on FBI and law enforcement matters is a short,

¹ THE FUNDAMENTALS OF COUNTERTERRORISM LAW (Lynne Zusman, ABA Section of Administrative and Regulatory Practice, 2014).

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² See e.g. Philip Zelikow, *Legal Policy for a Twilight War*, History News Network (May 31, 2007), <http://hnn.us/article/39494>.

³ LTC Shane Reeves is a judge advocate in the U.S. Army currently assigned as Academy Professor, Department of Law, United States Military Academy, West Point, New York.

⁴ LTC Robert Barnsby is a judge advocate in the U.S. Army, currently assigned as Chief, Administrative & Civil Law, Headquarters, U.S. Army Contracting Command, Redstone Arsenal, Alabama.

⁵ FUNDAMENTALS *supra* note 1, 1-6.

⁶ Robert M. Blitzer was employed from 2006 to 2012 as a vice president and Homeland Security Fellow at ICF International, a professional services company, in Fairfax, Virginia. Prior to joining ICF, Mr. Blitzer served from 2003 to 2006 as the Deputy Assistant Secretary in Charge of the Office of Public Health Emergency Preparedness, at the U.S. Department of Health and Human Services (HHS).

⁷ FUNDAMENTALS *supra* note 1, 7-21.

stump-speech style piece written by Thomas V. Fuentes⁸ that focuses on the FBI's jurisdiction over the murder of U.S. citizens outside the United States, and specifically discusses the killing of four U.S. personnel in Benghazi.⁹ This chapter is useful from a background and processes standpoint, as opposed to 'fundamentals' of CT law. However, the chapter's short length limits its breadth and causes it come across more as a defensive response in the midst of the Benghazi investigation. While a curious student may find this chapter devoid of CT law fundamentals, it does give a valuable snapshot of CT processes in a recent CT case.¹⁰ Finally, Raymond W. Kelly¹¹ rounds out the third law enforcement-related chapter by citing several recent domestic and international terrorism events as examples. A bit more developed than Mr. Fuentes' previous chapter, Mr. Kelly's chapter provides a very helpful backdrop for our current CT challenges and enduring threats.¹² He posits three important points to remember as we develop the legal apparatus to deal with CT: "First, the terrorist threat to the U.S. homeland remains severe, complex, and unrelenting. Second, medium-sized cities such as Boston are now in play for terrorism events. Third, the crude and simplistic attacks Al-Qaeda has been encouraging its followers to carry out are now being realized."¹³ In total, the law enforcement chapters provide good fundamentals, followed by two background and practical application to provide contextual challenges for our law enforcement assets.

The Drone Chapters

Chapter Twelve, "A Game of Drones—Unmanned Aerial Vehicles (UAVs) and Unsettled Legal Questions" by Colonel Martiza S. Ryan¹⁴ is the first of several chapters wrestling with the legal questions about the use of UAVs.¹⁵ The chapter is aptly first in the series as it provides an organized layout of the basic challenges of remote

⁸ Thomas V. Fuentes is president of Fuentes International, L.L.C., a consulting firm based in Washington, D.C. Mr. Fuentes served as assistant director of the Federal Bureau of Investigation's Office of International Operations from 2004 until his retirement in November 2008.

⁹ FUNDAMENTALS *supra* note 1, 23-25.

¹⁰ The author juxtaposed the investigative challenges in the recent Benghazi embassy incident with the investigations that followed the '98 bombings of the U.S. Embassies in Tanzania and Kenya.

¹¹ Raymond W. Kelly is a 43-year veteran of the NYPD, serving in 25 different commands before being named police commissioner in 2002. He served three years in the Marine Corps including a combat tour in Vietnam.

¹² FUNDAMENTALS *supra* note 1, 27-32.

¹³ *Id.* at 29.

¹⁴ COL Martiza S. Ryan is a judge advocate in the U.S. Army, currently assigned as Professor and Head, Department of Law, United State Military Academy, West Point, New York.

¹⁵ FUNDAMENTALS *supra* note 1, 185-211.

targeting—"whether the proper legal framework is that of the law of armed conflict, international law, domestic law, or perhaps some combination of some or all of them?"¹⁶ She follows with a thorough yet easy to follow discussion of some of the thornier sub-issues UAVs bring into play, such as the proper classification of the conflict,¹⁷ the challenges of the "unprivileged belligerent" status,¹⁸ the question of imminent attack vs. anticipatory self defense,¹⁹ and the questions of targeting American citizens abroad.²⁰ Not to be outdone, Colonel Dawn M. K. Zoldi's²¹ "On the Front Lines of the Homefront: The Intersection of Domestic Counterterrorism Operations and Drone Legislation" is also outstanding and provides an exceptionally educational overview of the fundamental laws relating to UAV usage.²² By providing a useful compendium of federal and state UAV legislation, Colonel Zoldi uses a hypothetical scenario closely tied to the facts of the Boston Marathon attack to help walk a student or entry-level CT attorney through how these federal and state laws would apply to the facts.²³ Colonel Zoldi concludes with her policy recommendations that would allow the continued use of UAVs as an effective CT tool while at the same time protecting our citizens' privacy concerns.²⁴

The Terrorist Financing Chapter

Jeff Breinholt's²⁵ "Demystifying Terrorist Financing" is unique in that it deals specifically with the legal tools for and practical effects of limiting or cutting off terrorist funding sources.²⁶ However, it is an excellent, concise overview of the laws, intelligence, and functional impact of exercising such power. In layman's terms, Mr. Breinholt walks the reader through the laws and lists that make it "a crime for anyone to knowingly engage in a financial transaction with people the United States officially designates as

¹⁶ *Id.* at 187.

¹⁷ *Id.* at 192-194.

¹⁸ *Id.*

¹⁹ *Id.* at 194-197.

²⁰ *Id.* at 200.

²¹ COL Dawn M.K. Zoldi is a judge advocate currently assigned as Chief, Operations Law, Headquarter, Air Combat Command (ACC), Joint Base Langley-Eustis, Virginia.

²² *Id.* at 281-342.

²³ *Id.*

²⁴ *Id.* at 305-306.

²⁵ Jeff Breinholt serves as an attorney-advisor in the Department of Justice's Office of Law and Policy, National Security Division. He previously served as the deputy chief of the Counterterrorism Section as a white-collar fraud prosecutor with the Tax Division.

²⁶ FUNDAMENTALS *supra* note 1, 267-280.

obnoxious.”²⁷ He discusses the efficacy of such lists and explains to the reader the dual effect these lists have as both a “prosecutor’s tool” and a “signaling tool.”²⁸ While a relatively short piece, Mr. Breinholt’s terror-financing chapter is, per page, one of the most informative and easy to follow chapters in this book.

The Military Commissions Chapters

While light on fundamentals of CT law, the two chapters discussing Military Commissions provide an important point to counterpoint argument about the efficacy of the Commissions.²⁹ More precisely, the focus is not on the how to prosecute or defend a case in front of the current Military Commissions framework, but whether the Commissions should be used. Relying heavily on a policy argument, Peter R. Masciola,³⁰ Christopher L. Kannady,³¹ and Michael D. Paradis³² contend that the current Military Commissions structure as a prototype national security court is a “bad idea” that has been “overcome by divisive politics”³³ and should be replaced by a national security bar administered by the Administrative Office of the United States Courts.³⁴ The authors use several examples of specialized courts and bars to propose that federal courts are indeed able to handle the complexities of CT litigation, much more so than the nascent, Uniform Code of Military Justice (UCMJ)-based Military Commissions.³⁵

Brigadier General (BG) Mark S. Martins³⁶ and Captain (Capt) (retired) Edward S. White³⁷ counter this criticism by citing the long history of Military Commissions in the

²⁷ *Id.* at 270.

²⁸ *Id.* at 276

²⁹ *Id.* at 49-81.

³⁰ Peter Masciola is the founding partner of MillerMasciola, a Washington, D.C. law firm in civil litigation. Mr. Masciola is a brigadier general and a judge advocate in the Air National Guard Reserve Component.

³¹ Christopher L. Kannady is Of Counsel to the Federal Practice Group in Washington, D.C. He continues to serve as counsel for Noor Muhammad, a Guantanamo Bay detainee. He is a major in the Air National Guard.

³² Michel Paradis is presently an attorney in the U.S. Department of Defense, Office of the Chief Defense Counsel, where he has argued cases on behalf of Guantanamo detainees in the military commissions and the federal courts of appeal.

³³ FUNDAMENTALS *supra* note 1, 49.

³⁴ *Id.* at 63.

³⁵ *Id.* at 49-81.

³⁶ Mark S. Martins is a brigadier general in the United States Army. He is currently assigned as the Chief Prosecutor of Military Commissions.

³⁷ Edward S. White retired as a captain in the United States Navy, most recently serving as Deputy Chief Prosecutor (Motions & Appeals) in the Office of the Chief Prosecutor of Military Commissions.

United States, illustrating the procedural safeguards and transparency of the Military Commissions Act of 2009, and downplaying the logistical costs cited in the previous chapter.³⁸ In short, the authors rebut the previous chapter’s criticism by providing details on how the current Commissions would not be politically divisive—where the previous article seemed to suggest that the Commissions may be irreparably damaged by the mere history of this division—and are fundamentally more fair process apt to handle the challenges of prosecuting these types of cases.³⁹

The two Military Commissions chapters are emblematic of the book’s minor shortcomings for two reasons. First, both chapters provide thorough insight about the issues that make the Military Commissions controversial. A moderately informed citizen, student, or entry-level attorney might simply think, “I heard those Commissions have problems,” or “I understand their use is controversial.” The two chapters do a good job laying out some of the more real, non-hyperbole issues at play. But what is lacking is a brief summary of the recent case law combined with a more basic layout of the Rules of Military Commissions that help constitute the current state of practice before the Commissions. While some of the rules and applicable case precedent are referred to, no concise reference for a student or entry-level practitioner is provided. Case in point: the *Boumediene vs. Bush*⁴⁰ case, a seminal decision establishing a habeas right for detainees, is not even mentioned. From this angle, the Military Commissions discussions lack the concise, pedagogical quality of Colonel Zoldi’s or Mr. Breinholt’s chapters. To be fair, the predecessor book “The Law of Counterterrorism” includes chapters by Dick Jackson and Major General Altenberg that better summarize Military Commission particulars and provide an illustrative chart about how they compare with other forums. As a singular resource, however, the two Military Commissions chapters of this book provide the reader with valuable insight but fail to stay true to the book’s “Fundamentals” title.

Conclusion

The *Fundamentals of Counterterrorism Law* is a good read for anyone wanting to generally familiarize himself with CT law basics and also a good resource for those desiring to learn more about a specific aspect of CT Law. While some of the chapters may appear more akin to the newspaper op-ed of the day, these sections are nonetheless valuable illustrations of the challenges and debates framing the development of CT law and are buttressed by the other immensely useful instructive chapters that provide the basic CT law framework and in some cases provide practical applications. While this book certainly stands as a viable

³⁸ FUNDAMENTALS *supra* note 1, 73-81.

³⁹ *Id.*

⁴⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

reference on its own merits, newcomers to the field should consider reading its predecessor as well.